SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

LEGAL SERIES NO. 4

APRIL 1958

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE
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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

TREASURY DEPARTMENT ANNOUNCES CHANGE IN POLICY ON TAX TREATMENT BY PATRONS OF NON-CASH REFUNDS

Hereafter, patrons of farmers cooperatives are to conform to the "principle" enunciated in the "Long Poultry Farms" and "B. A. Carpenter" cases decided by the 4th and 5th Circuit Courts of Appeals, respectively, in 1957 and 1955, in reporting patronage refund allocations which the cooperative has made to them in a non-cash form. The Treasury Department made this announcement in Technical Information Release No. 69, issued on February 14, 1958, the full text of which follows:

> "The Internal Revenue Service announced today that it will follow the decisions in Long Poultry Farms, Inc. v. Commissioner, 249 F. 2d 726 (C.A. 4, 1957), and Commissioner v. B. A. Carpenter, 219 F. 2d 635 (C.A. 5, 1955) in connection with the tax treatment of allocations of patronage dividends by cooperative associations to its patrons. Accordingly, steps will be taken to dispose of pending litigation and claims involving this issue in conformity with the principle enunciated in these decisions and to conform Treasury regulations and outstanding rulings to these decisions at the earliest practicable date."

This, in effect, supercedes the new regulations made final in December, 1957 (see I.R.B. 1957-49, p. 9).

The "Long Poultry Farms" case was reported in Summary L.S. No. 3, p. 23 and the "B. A. Carpenter" case in Summary No. 63, p. 1.

It is understood that it will be some time yet before the Internal Revenue Service will release revisions of its regulations. In the meantime, each taxpayer, with the advice of counsel if deemed necessary, will have to decide whether or not the principles of these cases apply to his situation. Apparently, it is intended as a general proposition that allocations of patronage dividends in a form other than cash will be taxable to patrons who report on a cash basis only when the cash in redemption thereof is received, unless the non-cash patronage allocation has an established market value, in which event the non-cash patronage allocation would be currently taxable to the patron at such value. Accrual basis taxpayers will report such allocations as income for the year in which the right to receive payments becomes reasonably definite and certain.

The undetermined issue is whether cash basis farmers will be allowed in all cases to report all non-cash allocations irrespective of their form at no market value on the assumption that there are no instances in which a demonstrable market value exists, or whether each taxpayer will be required to establish to the satisfaction of the Commissioner that in his case there is no market value for the particular allocation.

SUPPLY COOPERATIVE'S PATRONAGE CONTRACT UPHELD

(Cooperative Supply, Inc. v. Pacific Supply Cooperative, Civil No. 2017, N. D. Idaho, decided November 27, 1957)

A supply cooperative's full-requirements contract with its local member from which the local could withdraw at the end of any fiscal year by giving written notice at least 60 days prior to the annual meeting of the association was sustained by the United States district court in this case. The court said the contract was not in unreasonable restraint of trade and enforced the liquidated damages clause of the contract. This is a most significant decision, being the first to pass on the point at issue.

Excerpts from the "Findings of Fact and Conclusions of Law" follow:

"Findings of Fact

"I.

"Each of the plaintiffs are corporations, incorporated under and existing by virtue of the laws of the State of Idaho and that they are, respectively, non-profit farmers cooperative associations with their principal offices and places of business, respectively, at Coeur d'Alene and Sandpoint, Idaho.

"II.

"That the defendant is a corporation organized as such under the laws of the State of Oregon relating to farmers' cooperative associations and that it was and is at all times material to this action authorized and licensed to do business in the State of Idaho as a foreign corporation, and that it was and is a wholesale farmers cooperative association, with its principal place of business at Portland, Oregon, and with business offices at Walla Walla, Washington.

* * *

"IV.

"That for the sake of brevity in these Findings and Conclusions, the plaintiff, the Cooperative Supply, Inc. of Coeur d'Alene, Idaho, shall be referred to as 'COEUR D'ALENE', and the plaintiff, 'Co-op Supply, Inc.' of Sandpoint, Idaho, shall be referred to as 'SANDPOINT', and the defendant will be referred to as 'PACIFIC'.

"V.

"That for many years prior to July 1, 1954, both 'COEUR D'-ALENE' and 'SANDPOINT' continuously patronized 'PACIFIC' by purchasing all requirements of petroleum products required for the farmer patrons of both 'COEUR D'ALENE' and 'SANDPOINT' by and through 'PACIFIC' as a wholesale farmers cooperative federation, and did likewise purchase other merchandise cooperatively by and through 'PACIFIC', pursuant to Uniform Membership Agreement, a copy of which is attached to the Complaint herein marked 'Exhibit D', which Uniform Membership Agreement was approved by the voting delegates representing 'COEUR D'ALENE' and 'SANDPOINT' and representing other local member units of 'PACIFIC' at the annual meeting of stockholders of 'PACIFIC' held in November, 1941, which membership agreement was approved by the voting delegates and unanimously adopted by the 127 local member units of 'PACIFIC', including 'COEUR D'-ALENE' and 'SANDPOINT', at said annual meeting of 'PACIFIC' pursuant to Sec. 4, Article II of Articles of Incorporation of 'PACIFIC', and pursuant to Art. III of the amended By-Laws of 'PACIFIC'.

"VI.

"That for many years prior to July 1, 1954, 'PACIFIC', as cooperative bargaining agent for 'COEUR D'ALENE' and 'SAND-POINT' and some 125 other local member units of 'PACIFIC', and said local member units, including 'COEUR D'ALENE' and 'SAND-POINT', were the beneficiaries of a certain contract with General Petroleum Corporation, a copy of which contract is annexed to the Complaint herein, marked 'Exhibit C', and they were, likewise, beneficiaries of a contract between 'PACIFIC' and said General Petroleum Corporation entered into by 'PACIFIC' in reliance upon said membership agreements of 'COEUR D'ALENE' and 'SANDPOINT' in 'PACIFIC' for the purpose of acquiring petroleum products from General Petroleum Corporation in large volumes for the benefit of said local member units of 'PACIFIC' including 'COEUR D'ALENE' and 'SANDPOINT', and some 70,000

farmers belonging to said local member units of 'PACIFIC', and that in 1954 'COEUR D'ALENE' had some 1800 farmers who were patrons, and 'SANDPOINT' had some approximately 1,000 farmer patrons, for whose benefit said contracts were so entered into with General Petroleum Corporation for the purpose of obtaining an adequate supply of petroleum products of good quality at the lowest price reasonably obtainable by 'PACIFIC' for its said local member units, including 'COEUR D'ALENE' and 'SANDPOINT' and their said farmer patrons, and that said local member units of 'PACIFIC' at all times operated their several businesses strictly upon a non-profit cooperative basis, allocating all of their respective net margins strictly upon the basis of patronage, no profit inuring to either 'PACIFIC' or to any of the local members of Pacific, including 'COEUR D'ALENE' and 'SANDPOINT', said annual net margins all being ultimately allocated and paid unto said individual farmer patrons.

"VII.

"That both 'COEUR D'ALENE' and 'SANDPOINT', as local member units of 'PACIFIC', subscribed for and accepted Class A Common voting stock in 'PACIFIC', as required by the Articles and By-Laws of 'PACIFIC', and all amendments thereto, and that both 'COEUR D'ALENE' and 'SANDPOINT' did, for many years prior to and during 1954, participate in the business affairs of 'PACIFIC' as voting stockholders and patrons of 'PACIFIC', and that both 'COEUR D'ALENE' and 'SANDPOINT' were represented at successive annual meetings of 'PACIFIC' at which the Articles, By-Laws, Membership Contract and said General Petroleum Contract and amendments thereto were approved and adopted, and that both 'COEUR D'ALENE' and 'SANDPOINT' did participate as stockholders at the annual meeting of 'PACIFIC' in 1941, at which time the said Uniform Membership Agreement of 'PACIFIC' was adopted, including provisions for assessment of liquidated damages, as provided in said Uniform Membership Agreement, and that both 'COEUR D'ALENE' and 'SANDPOINT' did participate as stockholders at the annual meeting of the 'PACIFIC' in 1954, at which the provision for assessment of liquidated damages contained in the Membership Agreement, attached to the Complaint as 'Exhibit D' was reapproved by the stockholders of 'PACIFIC' and directed to be enforced.

"VIII.

"That on or about July 1, 1954, 'COEUR D'ALENE' and 'SANDPOINT' did cease to patronize 'PACIFIC' by refusing to purchase from and through 'PACIFIC' their respective requirements of petroleum products and did commence to purchase their requirements of petroleum products from Farmers Union Central Exchange, a competitive source of supply, in direct repudiation and violation of the membership relations of 'COEUR D'ALENE' and 'SANDPOINT' with 'PACIFIC', and in violation of said membership agreements in 'PACIFIC', and that 'COEUR D'ALENE' and 'SANDPOINT' ever since have been and are purchasing their petroleum products and other supplies from sources other than 'PACIFIC', in continued violation of said membership agreements.

"IX.

"That 'PACIFIC', from time to time thereafter, sought to induce 'COEUR D'ALENE' and 'SANDPOINT' to resume patronage in 'PACIFIC' and to purchase their respective requirements of petroleum products from and through 'PACIFIC' but that each of the said corporations have refused and continued to refuse to purchase said requirements of petroleum products from and through 'PACIFIC'.

"X.

"That on or about February 1, 1955, as required by the Articles and By-Laws of 'PACIFIC', the Board of Directors of 'PACIFIC' did direct the issuance of notice unto both "COEUR D'ALENE' and 'SANDPOINT' assessing liquidated damages against 'COEUR D'ALENE' and 'SANDPOINT', respectively, as required by the Articles and By-Laws and Membership contracts of 'PACIFIC', and granting unto 'COEUR D'ALENE' and 'SANDPOINT', and each of them, sixty days within which to resume patronage in 'PACIFIC'; that 'COEUR D'ALENE' and 'SANDPOINT', and each of them, for a full 60-day period following receipt of said notices, requested no further hearing before the Board or before any stockholders' meeting of 'PACIFIC', but continued to violate their said membership contracts during said 60-day period and subsequent thereto by purchasing their petroleum products elsewhere than through the defendant corporation, and did cause the Complaint and Temporary Restraining Order to be served upon the 'PACIFIC' about 5:00 o'clock P. M. on April 4, 1955, or more than sixty days after receipt of said notices so assessing liquidated damages as aforesaid, and that 'PACIFIC' lawfully assessed said liquidated damages against 'COEUR D'ALENE' and 'SANDPOINT', respectively, prior to 4:00 o'clock P. M. April 4, 1955, in accordance with the Articles and By-Laws of 'PACIFIC' as amended, and in accordance with the terms and provisions of said Uniform Membership Agreement between 'COEUR D'ALENE' and 'SANDPOINT' and 'PACIFIC'.

"XI.

"That the amounts of liquidated damages so assessed by 'PACIFIC' as against both 'COEUR D'ALENE' and 'SANDPOINT' is reasonable and is less than the actual damages sustained by 'PACIFIC' as a result of said violations of said membership relations by 'COEUR D'ALENE' and 'SANDPOINT', and each of them, and that said Uniform Membership Agreement provides a reasonable formula for the predetermination and liquidation of damages likely to be sustained by 'PACIFIC' by repudiation of breach of said membership agreement by any local member unit of 'PACIFIC', including 'COEUR D'ALENE' and 'SANDPOINT', and that said provision for liquidated damages does not amount to a penalty and that said provision for liquidated damages in said Uniform Membership Agreement of 'PACIFIC', to which 'COEUR D'ALENE' and 'SANDPOINT' were parties, as aforesaid, was required, due to the uncertainty of damages to be sustained by 'PACIFIC' upon breach of said membership relations and due to the difficulty of proving the actual damages to be sustained by 'PACIFIC' as an outgrowth of a breach of said membership agreement by 'COEUR D'ALENE' or by 'SANDPOINT' or by other member units of 'PACIFIC', which depended and depends upon maintenance of a large volume of purchasing power for the protection of its patrons.

"XII.

"That said Uniform Membership Agreements were entered into between 'COEUR D'ALENE' and 'SANDPOINT' and 'PACIFIC' in part consideration for like membership agreements entered into between 'PACIFIC' and its other 125 local member units.

"XIII.

"That the withdrawal by 'COEUR D'ALENE' and 'SANDPOINT' and their respective refusals to purchase petroleum products from and through 'PACIFIC', as aforesaid, were material breaches of said Uniform Membership Agreement of 'PACIFIC' and were tantamount to withdrawal by 'COEUR D'ALENE' and 'SANDPOINT' from 'PACIFIC'. That neither 'COEUR D'ALENE' nor 'SANDPOINT' gave unto 'PACIFIC' at any time Notice of Withdrawal as required by Sec. 13 of Art. III of the amended By-Laws of 'PACIFIC' under which provision for withdrawal either 'COEUR D'ALENE' or 'SANDPOINT' or any local member unit of 'PACIFIC' might withdraw effective as of June 30th of the year following the giving of such Notice of Withdrawal, and that said provision in the Articles and By-Laws of 'PACIFIC' was a reasonable provision, and that said agreements between 'COEUR D'ALENE' and 'SANDPOINT' and the local member units and 'PACIFIC' were not in restraint of trade within the meaning of any law of the United States or the State of Idaho or of the State of Oregon,

under which laws 'PACIFIC' was organized.

"From the foregoing Findings of Fact the Court makes the following

"Conclusions of Law

"I.

"That the Court has jurisdiction over the parties and subject matter of this action.

"II.

"That the defendant 'PACIFIC' is entitled to Summary Judgment herein, providing for the dismissal of the Complaint herein with prejudice, and for dissolution of the temporary injunction heretofore issued out of this Court in these proceedings, which Summary Judgment shall uphold the validity and enforceability of the Uniform Membership Agreement, a copy of which is attached to and made a part of the Complaint herein, marked 'Exhibit D'.

"III.

"That said Uniform Membership Agreement, attached to the Complaint herein and marked 'Exhibit D', as aforesaid, contains reasonable provisions for the liquidation of damages in the event of breach of said contract by any local member unit of 'PACIFIC' and was reasonably required in view of the uncertainty of damages and the difficulty of proof of damages growing out of any breach or repudiation of said membership relations in 'PACIFIC' by any of its local member units, including 'COEUR-D'ALENE' and "SANDPOINT', and that said Uniform Membership Agreement provides for no penalty but only reasonable liquidated damages.

"IV.

"That, therefore, there is no necessity for proof of actual damages herein, as the damages sustained by 'PACIFIC' are governed by said Uniform Membership Agreement, to which both 'COEUR D'ALENE' and 'SANDPOINT' were parties at the time of their respective breaches of said Uniform Membership Agreement, thereby entitling 'PACIFIC' to claim said liquidated damages in accordance with said contracts.

"V.

"That this cause being of equitable cognizance, no costs shall be allowed unto either party."

DEBT OWED COOPERATIVE CANNOT BE SET OFF AGAINST PATRONAGE CREDITS

(In the Matter of the Petition of Alvin Helrigel, et al., Circuit Court for Barry County, Michigan, March 11, 1958)

The pertinent facts in this case are, briefly, as follows:

Action was commenced in Chancery to dissolve the Freeport Middleville Cooperative Creamery Co., a cooperative organized in December 1953 through the consolidation or merger of two cooperatives - the Middleville Cooperative Creamery Co. and the Freeport Cooperative Creamery Co. On September 12, 1957, an order was entered dissolving the corporation and appointing a receiver to effect dissolution.. When the receiver sought to collect certain debts for merchandise purchased from the cooperative, the member patrons tried to set off against such debts certain "certificates of interest" which the cooperative had issued and which evidenced patronage allocations made to such patrons.

As will be seen from excerpts from the opinion, set forth below, the court analyzed the nature of these certificates. He concluded that they were capital interests and junior to the rights of general creditors. As such, they were not "mutual debts" which could be offset against a debt for merchandise purchased. A debt owed by the receiver for milk, or cream, however, could be offset against a debt owed by the patron for merchandise, the court said. Although the attorney for the certificate holders had also questioned the validity of the merger of the prior corporations, the court found that the new corporation was at least a de facto corporation, since it had functioned and committed "acts of user" for several years, and no member had questioned its right to do so until this petition for set off was filed.

On the set off point, the court said, in part:

* * *

> "Now follows the question originally presented to this Court, namely, the nature of the certificates of indebtedness issued to the members.
>
> "This arises by virtue of the claimed right of set-off above referred to by purchasers of merchandise from the corporation and now wish to set off their claimed interest in those certificates against such claims for merchandise.
>
> "The Articles of Incorporation of the new corporation provide for the establishing of reserve funds out of so-called patronage dividends -- it being, however, within the power of the Board of Directors to determine when and if such interests should be paid.

"The Articles state: 'Whenever, in any given year, the operations of the corporation result in an operating loss, such loss, to the extent that capital reserves are sufficient, shall be charged against the same and they shall thereby be reduced accordingly. The Board of Directors shall prescribe the basis on which the capital reserve contributions of patrons, by years, shall be reduced on account of any such loss so that losses shall be borne by the patrons upon as equitable basis as the Board of Directors deem practicable.'

"The old Freeport corporation articles provided for reserve funds to be built up based upon the certificates of interest issued, but amongst other provisions provided for the use of said funds for payment of obligations of the corporation and it was entirely up to the Board of Directors to determine what reserves were set aside, depending upon the amount of business done by the patrons, and in general all of it is contingent upon the successful operation of the business. The old Middleville corporation does not seem to have spelled out those terms as thoroughly, although previous Articles of Incorporation did.

"The Amended Articles of Incorporation of February 16, 1942, provided as follows: 'The net earnings for each fiscal year of the corp-shall be distributed or allocated for future distribution to members and non-member patrons doing business with the corporation on the basis of, or in proportion to, the value of products bought from or supplies purchased for, or services rendered to the patrons and members who have patronized the corporation during the year.'

"There does not seem to be a great deal of case law on the subject. It is pointed out in one of the briefs submitted that there is text material edited by Evans and Stokdyk in their book called 'The Law of Cooperative Marketing.' Page 194 says this with reference to 'Reserves'; one of the terms used in this matter, referring to reserves on the books and claimed to be due to certificate holders:

> "'RESERVES - There is much confusion concerning the status of reserves and the manner of establishing them. A careful examination of the by-laws of some associations indicates that the deductions made to establish 'reserves' are merely loans from the members rather than true reserves. In such cases members are creditors of the organization to the extent of the deductions, whereas if the deductions are made to establish true reserves, members individually have no claim on them. In a few instances co-operatives have disbursed their reserves under a misconception of the nature of them. They have segregated on their books an account called 'reserves' and established individual equities in

> them by issuing 'reserve certificates', which are rotated in the same manner as membership capital or revolving funds. They fail to realize that when such a procedure is followed, the account which is called 'reserves' is not a reserve but is merely membership capital. True reserves in non-profit corporations are undivided and unassigned equities which are held to withstand losses. The courts have sustained this view of the naturesof the reserves, holding that the reserve fund is a permanent continuing fund and corporate asset not limited to the year's business in which it is collected, and furthermore, that reserves may be used for the purposes deemed advisable by the association, including the financing of physical facilities[3] (Burley Tobacco Growers' Co-op. Assn. v Tipton (1928) 227 Ky. 297, 11 S.E. (2d) 119), or the formation of subsidiaries.[4] (Tobacco Growers' Co-op Assn. v Jones (1923) 185 N.C. 265, 117 S.E. 174, 33 A.L.R. 231). If the reserves of an association reach a point where they are considered more than adequate, a portion or all may be distributed to members if the association is not in debt. However, if there are obligations due creditors, the reserves cannot legally be disbursed in disregard of their rights.[5] (Texas Farm Bureau Cotton Assn. v. Lennox et al (1927) 117 Tex. 94, 297 S.W. 743; and Associated Fruit Co. v Idaho-Oregon Fruit Growers' Assn. (1927) 44 Idaho, 200, 256 p.99).'

"According to the foregoing, the equities set up as reserves on the books constitute membership capital.

"The same text says, on Page 171 thereof:

> "'The status of members' contributions to the funds of non stock organizations varies with different organizations. If these contributions are not evidenced by special certificates or set up as special funds on the books of the association, the assumption is that they are part of the undivided assets and in case of dissolution the holders of membership certificates would receive such undivided assets subject to the rights of creditors, provided of course there were no provisions of law, articles or by-laws to the contrary. If members' contributions to the finances are evidenced by certificates having definite maturity dates, then, in case of liquidation, the members who hold such certificates would generally share in the assets of the organization with unsecured creditors. However, some associations provide in their by-laws that in the event of liquidation or dissolution, such contributions to capital, though evidenced by certificates, are

> subject to the rights of creditors. It has been held that money deducted from the proceeds of sales for the purpose of paying certificates of indebtedness may be seized by creditors and that holders of certificates of indebtedness may be deemed a species of shareholders.[12] (United States & Mexican Oil Co. v. Keystone Auto Gas & Oil Service Co. (1924); D.C.) 19 F. (2d)624). In some cases the certificates definitely state on their face that the holders have prior claim to any assets over membership certificate holders. In a few instances, certificates issued to evidence capital are so issued as to constitute a lien on part or all of the physical assets of the association. If members' contributions to special funds are revolved or rotated, they become a liability of the organization when they are declared due and payable or when they carry a fixed maturity date. If they do not carry a fixed maturity date and are subject to the rights of creditors, they are a part of the membership capital and are similar to the preferred stock of a profit corporation.'

"The Court has concluded therefor that the reserves claimed by certificate holders are capital of the corporation, and liable for its debts.

* * *

"The owners of certificates of interest or reserves' claim is junior to that of general creditors, and such claims cannot be set off against obligations for merchandise purchased from the corporation.

"Further, if the receiver owes a holder of interest for milk or cream, there may be a set-off in the cases of the purchase of merchandise."

CONSENT JUDGMENT ENTERED IN ANTITRUST ACTION AGAINST NATIONAL CRANBERRY ASSOCIATION

(United States v. National Cranberry Ass'n, Civil No. 55-418-3, D. Mass., Oct. 28, 1957)

On October 28, 1957, the United States and the defendants in the Sherman Act case against National Cranberry Association and several other individual and corporate defendants came to an agreement and consented to the entry of a final judgment. The complaint in this case was reported in Summary No. 64, p. 6.

Excerpts from the final judgment follow:

". . . . The complaint states a claim for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly known as the Sherman Act as amended.

"II

"As used in this Final Judgment:

"(A) 'NCA' shall mean the defendant National Cranberry Association, a cooperative corporation organized and existing under the laws of the State of Delaware, and with its principal office and place of business at Hanson, Massachusetts;

"(B) 'ADM' shall mean the defendant A. D. Makepeace Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Wareham, Massachusetts;

"(C) 'United' shall mean the defendant United Cape Cod Cranberry Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Hanson, Massachusetts;

"(D) 'Urann' shall mean the defendant Marcus L. Urann, an individual;

"(E) 'Makepeace' shall mean the defendant John C. Makepeace, an individual;

"(F) 'Person' shall mean any individual, partnership, firm, corporation, association, trustee, cooperative or any other legal or business entity.

* * *

"IV

"Defendant NCA is enjoined and restrained from:

"(A) Entering into, renewing, maintaining or adhering to, (1) during the five years immediately following the date of entry of this Final Judgment, any agreement for the marketing of cranberries for any person, for a term of more than one year unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of any year, and (2) after such five year period, from entering into any agreeaent for the marketing of cranberries

for any person for a term of more than three years unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of the third year and each subsequent third year of its term;

"(B) Having, or allowing to serve, as one of its officers or directors, any person whom it knows to be engaged in, or to be an officer, director or agent of, any other person engaged in, the processing or marketing of cranberries or cranberry products in competition with NCA;

"(C) Entering into, renewing, maintaining or adhering to any agreement or arrangement with any other person engaged in the marketing of cranberries to allocate or divide markets;

"(D) Contracting for or otherwise arranging for the processing of any of NCA's cranberries by any other processor at any time when NCA has available capacity and could process such cranberries itself without incurring substantially greater expense;

"(E) (1) Following any sales policy on cranberry products which includes any element of rebate or discount from the purchase price unless the amount or mathematical formula for calculating the amount is disclosed to the customer at or before the time of purchase by him, or which grants any bonus or allowance to customers on the basis of business done prior to the period to which such bonus or allowance applies;

"(2) Granting any allowance or subsidy on account of lossess incurred by NCA customers on resale of cranberry products purchased from NCA, except that this provision shall not apply to guarantees against, or allowances for, general NCA price declines on floor stocks, or to guarantees against, or allowances for, losses due to damage or defects in quality;

"(3) Granting any manufacturers' discount to anyone other than a manufacturer;

"(F) (1) Receiving from any member for marketing any cranberries which it knows to have been grown by a person not a member of NCA or receiving from any person not a member of NCA for marketing any cranberries except on the same terms or conditions as to payment therefor as would apply if such person were a member;

"(2) Discriminating among members in the administration of any pooling of cranberries;

"(3) Exchanging with any person cranberries suitable for the fresh market for cranberries suitable only for processing, to prevent such cranberries from being acquired by any person engaged in the marketing of cranberry products in competition with NCA;

"(G) Entering into, enforcing or adhering to any agreement or arrangement for the destruction of cranberries with any other person engaged in the processing or marketing of cranberries.

"V

"The plaintiff may, within one year after the expiration of five years immediately following the date of entry of this Final Judgment, and without the necessity of showing any change in circumstances occurring subsequent to the entry hereof, petition this Court for such further relief as it may then deem necessary or appropriate with respect to the marketing by defendant NCA of cranberries for processing and processed cranberries. In such event, if plaintiff's petition prays for relief requiring NCA to divest itself of any processing facilities, the defendants NCA, ADM and United shall be required to assume the burden of showing cause why the requested relief on the facts and the law should not be granted. Also in such event, neither the entry of this Final Judgment nor any of the provisions hereof shall operate as a bar or estoppel as to any issue of law or fact raised in such proceeding or bar or estop the plaintiff or the defendants NCA, ADM and United from introducing any evidence or testimony therein with respect to any such issue.

"VI

"Defendants ADM, United, Makepeace and Urann are jointly and severally enjoined and restrained from:

"(A) Purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress or stabilize market price levels of fresh or processed cranberries;

"(B) Delivering to NCA any cranberries other than those grown by them or their subsidiaries, or for them or their subsidiaries pursuant to agreement;

"(C) Exercising voting rights on common stock of NCA for a period of three years immediately following the date of entry of this Final Judgment, except that:

"(1) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period for the election of directors of NCA, provided, however, that none of them may vote for more than 10% of the total number of directors to be elected in each such election; and

"(2) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period in connection with any matter under NCA's charter or by-laws or applicable Delaware statutes requiring a stockholders' vote and which is directly connected with the transfer, assignment, pledging, sale, liquidation or other disposition of capital assets of NCA, or with any amendment of the Certificate of Incorporation of NCA.

"Provided, however, that this subsection (C) shall not be deemed to apply to any person acquiring in good faith common stock of NCA from any of said defendants by transfer or by operation of law, if such person is not an officer, director, servant, employee or agent of any of said defendants;

"(D) Inducing or compelling, or attempting to induce or compel any financial institution to take any action with respect to the granting or calling of loans for the purpose of discriminating against any borrower who is a competitor of NCA.

"VII

"In the event that any of the provisions of this Final Judgment shall conflict with any provision of any marketing agreement with, or marketing order of, the Secretary of Agriculture, the defendant NCA, without showing any other change in circumstances and upon notice to the Assistant Attorney General in charge of the Antitrust Division, may petition this Court for such modification of such of the terms of this Final Judgment as is necessary to permit compliance with such marketing agreement or order."

The judgment became effective 10 days after entry. Jurisdiction was retained by the court to aid in carrying out the judgment.

WHAT CONSTITUTES "CARRYING ON A TRADE OR BUSINESS FOR PROFIT"?

(Hospital Bureau of Standards and Supplies v. United States, 158 F. Supp. 560)

In this case, the Court of Claims held that a corporation found to provide highly specialized services to its members which were tax-exempt, charitable hospitals, and whose activities essentially involved evaluation and purchase of necessary hospital supplies for its members on a non-profit basis (since it returned its income, in excess of operating expenses to its members in the form of "patronage refunds" or retained part in a revolving fund to be used exclusively in purchasing items for members) was not an "organization organized for primary purpose of carrying on a trade or business for profit" for purpose of the "feeder organization" amendment of 1950, but was entitled to tax exemption under section 101(6) of the Internal Revenue Code of 1939.

The taxpayer, having filed returns and paid taxes for the years 1952 and 1953, brought action to recover the taxes paid. The court pointed out that the corporation was organized under Membership Corporations Law of the State of New York and confined its membership to "any hospital or similar institution not conducted for profit, and engaged in whole or in part in charitable work." It engaged in only two major activities - (1) group purchasing for members and (2) maintenance of a research department to "establish uniform standards as to quality and price of supplies." The opinion continues in part:

> "The plaintiff derives an income from dues paid by its member institutions, from cash discounts secured through prompt payment to suppliers, and from a service charge on all 'jobbing' items. Income in excess of operating expenses is retained in a revolving fund for purchases for members. Being a membership corporation, the plaintiff has no capital stock, has no stockholders, and pays no interest or dividends of any kind. The executive director is the only officer receiving a salary from the plaintiff corporation, and only those employees who are actually and wholly engaged in the daily operation of the plaintiff are compensated for their services. The membership of the Hospital Bureau of Standards and Supplies, Incorporated, consisted of 207 institutions in the year 1952.
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> "Unquestionably the technical analysis and purchase of hospital supplies from suppliers are necessary and indispensable to the operations of the plaintiff's member hospitals. It was with a view to provide this highly specialized service, that

the plaintiff was incorporated. We have confirmed in finding 16 that plaintiff's activities effected savings to its member institution. . . .

* * *

"Whether the plaintiff loses its exemption as a result of the 'feeder organization' amendment of the Revenue Act of 1950, section 301(b) involves a question of fact as to whether it was an 'organization operated for the primary purpose of carrying on a trade or business for profit' during the years in question. The nature of plaintiff's activities, essentially involving the evaluation and purchase of necessary hospital supplies for its member organizations, and its corporate and financial structure, a membership corporation without capital stock and stockholders, paying neither interest nor dividends, compensating only its executive director and employees engaged in its daily operations, with its income in excess of operating expenses returned to its members in the form of 'patronage refunds' or retained in a revolving fund to be used exclusively in purchasing items for members, are not the indicia of an organization operating for the primary purpose of carrying on a trade or business for profit. At most, the plaintiff was performing a function which each of its member hospitals would have to assume were it not for the plaintiff's existence. . . . When all phases of the plaintiff's activities during the taxable years are taken into account, we feel compelled to hold that it was not an organization operating for the primary purpose of carrying on a trade or business for profit."